IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO: 450/2000

In the matter between:

MUNICIPALITY OF PORT ELIZABETH **Appellant**

and

RHONA SMIT **Respondent**

CORAM: HOWIE, MARAIS, FARLAM, BRAND et NUGENT JJA

Date Heard: **1 March 2002**

Delivered: **25 March 2002**

All disputes between parties resolved by agreement prior to hearing of appeal - Court's power in such circumstances to entertain the appeal on its merits, assumed not decided - appeal dismissed under s 21A(1) of Act 59 of 1959

J U D G M E N T

BRAND JA

BRAND JA

[1] The preliminary question to be decided in this appeal is whether it should be entertained at all. As appears from what follows the factual background against which this question arises can be stated quite simply.

[2] The appellant is responsible for over 200 000 manhole covers in the City of Port Elizabeth. The respondent stepped onto one of these manhole covers which was situated on a pavement. The cover tilted crossways and the respondent fell into the manhole. She sustained injuries to her leg and suffered a loss. Her claim for damages in the magistrates' court was upheld and she was awarded an amount of R9 000,00. The appellant's appeal against the magistrate's judgment to the Eastern Cape Division was dismissed by Nepgen J with Kroon J concurring. With the leave of the Court *a quo* the appellant then proceeded with this further appeal.

[3] From the evidence it appears that the manhole cover in question consisted of a concrete slab banded in metal, which rested on a metal frame set into the pavement. When the cover is securely placed in its metal frame, it is supported on three sides by the frame with the consequence that it is capable of taking weight without tilting. If, however, the cover is displaced so that it rests diagonally across the manhole with more than one of its sides unsupported by its frame, it can tilt when stepped upon. On the probabilities this is what happened to the respondent.

[4] From the outset the appellant accepted that it was under a duty to take reasonable measures to ensure that manhole covers under its control, including the cover in question, do not pose a danger to those who might step on them. The only issue was whether the appellant had failed to take such reasonable measures. In this regard evidence was led on behalf of the appellant that manhole covers were frequently displaced by members of the

public and that, so it was contended on behalf of appellant, there were no steps reasonably available to it to ensure that all manhole covers were properly and securely in place at all times. Despite this evidence the magistrate found that the appellant was negligent. Nowhere in his judgment did the magistrate indicate, however, what he considered that the appellant could reasonably have done to ensure that the manhole cover stepped on by the respondent was securely in place. In the Court *a quo* Nepgen J found the appellant's negligence to lie in its failure to provide the manhole covers under its control with hinges. From his judgment it appears that this finding was essentially based on three considerations. First, that the appellant had been aware of the fact that manhole covers were frequently displaced and so caused a danger. Secondly, that if manhole covers were provided with hinges it would undoubtedly prevent them from being displaced and thus causing a danger. Thirdly, that the evidence presented by the appellant did

not establish that it would place an undue financial burden on it to insist that hinges were affixed to its manhole covers. On appeal the appellant's main objection was aimed at the third consideration. In support of this objection the appellant referred to passages in the record of the evidence at the trial from which it appeared, so the appellant contended, that the affixing of hinges to its manhole covers would be a costly operation which would impose an undue financial burden on the appellant bearing in mind its overall financial commitments.

[5] After leave to appeal to this Court had been granted, the parties entered into a written agreement which they entitled "Agreement of Settlement". It provides:

> 'TAKE NOTICE THAT the parties have reached agreement to settle the above matter on the following basis:
>
> 1. The Respondent hereby withdraws her opposition to the appeal;

2. The Appellant will prosecute the appeal at own risk and expense, the Respondent recognising that the outcome of the appeal is of significance to the Appellant from a principle (sic) point of view;

3. In the event of the Appellant's appeal being upheld, the Appellant indemnifies the Respondent in respect of both the outcome and any costs order which may be made against the Respondent flowing from the judgment of the above Honourable Court [i e this Court]. Conversely, in the event of the Appellant's appeal being dismissed, the Respondent waives her right to recover the capital and costs awarded in the Court *a quo*, the costs of the present appeal and the appeal to the Eastern Cape Division of the High Court of South Africa against the order of the Court *a quo*.

4. The Appellant and Respondent shall each bear their own costs incurred in the original action and subsequent appeals.'

[6] The practical result of the Settlement Agreement appears to be that the parties have effectively resolved all their differences. There is no longer any dispute or *lis* between them. Although the agreement is formulated in a way that makes the indemnity and the waiver by the parties, respectively, conditional upon the outcome of this appeal, it is clear that a businesslike

approach to the terms of the settlement leads to one conclusion only, namely that whatever the outcome of the appeal, it will have no effect whatsoever on the respondent or on the position of the parties *inter se*. It is in these circumstances that the question arises, whether the appeal should be entertained on its merits by this Court at all. Relevant to this question are the provisions of s 21A(1) of the Supreme Court Act 59 of 1959 ('s 21A'). This section lays down that when 'the issues' in an appeal are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on that ground alone.

[7] It can be argued, I think, that s 21A is premised upon the existence of an **issue** subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting **issue** or *lis* between the parties the resolution of which, for some or other reason, has

become academic or hypothetical. When there is no longer any **issue** between the parties, for instance because all issues that formerly existed were resolved by agreement, there is no 'appeal' that this Court has any discretion or power to deal with. This argument appears to be supported by what Viscount Simon said in *Sun Life Assurance Company of Canada v Jervis* 1944 AC 111(HL) 114 when he said, with reference to facts very similar to those under present consideration:

> '... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.'

Consequently, he found that in a matter where there was no existing *lis* between the parties, the appeal should be dismissed on that ground alone (at 115). (See also *Ainsbury v Millington* [1987] WLR 379 (HL) 381). More recently, however, it was said by Lord Slynn of Hadley in *R v Secretary of*

State for the Home Department, Ex parte Salem [1999] 2 WLR 483 (HL) 487 H that:

> '... I accept ... that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se'.

It is true that Lord Slynn immediately proceeded to confine this discretion to entertain an appeal, where there is no longer a *lis* between the parties, to the area of public law and added that the decisions in the *Sun Life* case and *Ainsbury v Millington* must accordingly be read as limited to disputes concerning private law rights between the parties to the case (487 H - 488 A). In my respectful view it seems, however, that this distinction between public law and private law is founded on considerations of expedience rather than on principle. If, as a matter of principle, a court has no power and therefore no discretion to consider an appeal where there is no *lis*, in the

sense of a matter in actual controversy *inter se,* I can see no reason why this principle should not apply to matters of public law as well. Conversely, if a court has the discretion to entertain an appeal despite the absence of a *lis*, in the above sense there seems to be no reason in principle why this discretion should not also extend to litigation between two private individuals as well. However, in the view that I hold regarding the outcome of this matter, it is unnecessary to resolve these questions. I will assume in favour of the appellant, without deciding, that this Court has a discretion to entertain the instant appeal under s 21A.

[8] The appellant found authority for its contention, that this appeal should be considered on its merits, in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) which was, according to the appellant, entertained and decided by this Court on facts similar to those under present consideration. I do not agree that the facts of the two matters are similar.

The vital distinction is that in the *Bakkerud* case the respondent abided the decision of this Court (see 1054 A-C of the report). If the appeal was unsuccessful she would therefore be entitled to payment of the judgment debt. If it was successful she would not. Consequently, she had a real and substantial interest in the outcome of this Court's decision even though she elected not actively to participate in the appeal. In this matter the respondent has no such remaining interest. Whether the appeal is successful or not will make no difference to her whatsoever. She has effectively abandoned the judgment in her favour. It is this total lack of interest on the part of respondent in the outcome of the appeal and the absence of any remaining dispute between the parties that weighs heavily against this Court exercising its discretion in favour of entertaining the appeal on its merits.

[9] The appellant's contention as to why the Court should, despite these

weighty considerations, entertain the appeal, was that it was launched as a matter of principle with the purpose of causing the precedent established by the judgment of the Court *a quo* to be set aside. Should the appellant allow this precedent to stand, so the argument went, the appellant and other local authorities would be obliged to fit hinges to all manhole covers under their control, which they simply cannot afford.

[10] The short answer to this contention is, in my view, that it is largely unfounded. The decision by the Court *a quo* which forms the subject of the appellant's complaint is not definitive of the appellant's general legal duty. The authority of the decision is confined to the proposition that in the circumstances disclosed by the evidence in the case, the appellant was under a legal duty which it had failed to perform. The decision is not binding on any other court, including a magistrate's court within the area of jurisdiction of the Court *a quo*, except in a case where the facts are found to be the

similar in all material respects. From a practical point of view, the Court *a quo's* finding of fact is not of a kind will, by its very nature, create an insurmountable obstacle for the appellant in future litigation. What the finding of the Court *a quo* amounted to was that on the evidence presented at the trial the appellant had failed to establish that the fixing of hinges to its manhole covers would impose an unreasonable financial burden upon it. The appellant's contention on appeal is, in essence, that the Court *a quo's* finding is not borne out by the evidence led at the trial. However, the question whether this contention is supported by an analysis of the evidence on record will be of no consequence in any future case. If the appellant should in a future case produce specific and properly motivated evidence to the effect that the affixing of hinges to its manhole covers will indeed impose an unreasonable financial burden upon it, the result may very well be different. As to future litigation against other local authorities, the possible

adverse influence of the Court *a quo's* findings of fact seems to be even more remote. Whether it is reasonable to require a particular local authority fix hinges to its manhole covers, must surely be decided with reference to all the facts and circumstances pertaining to that local authority.

[11] In my view, a further reason for this Court to refuse to embark on a consideration and a decision of the appeal on its merits, assuming that there is a point of any importance in the case, is that any such decision will be based on argument heard only from one side. As was pointed out in *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA) 84 E (also a case where a point of principle was sought to be argued):

> '...[I]t is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case.'

[12] For these reasons and in the exercise of this Court's discretion under

s 21 A of the Supreme Court Act the appeal is dismissed with costs.

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FDJ BRAND
JUDGE OF APPEAL

CONCURRED:

HOWIE JA
MARAIS JA
FARLAM JA
NUGENT JA